IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 407

IMMACULATE CONCEPTION CHURCH OF LOS ANGELES, LAKE CONGREGATIONAL CHURCH OF PASADENA, AND ELEVEN TEN BROADCASTING CORPORATION, *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 5, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A, *infra*, has not yet been reported. The opinions and orders of the Federal Communications Commission (R. 380, 497, 507) which were affirmed are reported at 32 FCC 706 and 33 FCC 92.

JURISDICTION

The judgment of the Court of Appeals, dated July 5, 1963, affirming the decision of the Commission, was entered on July 5, 1963 (R. 644). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

1. Whether constitutional due process and the requirement in the Communications Act that adjudicatory hearings before the Federal Communications Commission must be preceded by notice "specifying with particularity the matters and things in issue" are violated by a procedure whereby the Commission takes away a broadcast license, not on the basis of its resolution of specifically-noticed issues, but on the ground that evidence adduced under those issues warrants adverse findings on unspecified issues.

2. Whether the requirement in the Communications Act that the public interest, convenience and necessity must be determined by the Commission in passing upon applications for renewal of broadcast licenses is violated by Commission action taking away a broadcast license on findings of attempted deception without giving any consideration whatever to the loss which the public will sustain by the elimination of the station's unique and superior programming service.[1]

[1] The question whether the record supports the Commission's conclusion that the licensee's controlling stockholder had attempted to deceive the Commission will also be raised if certiorari is granted without limitation.

STATUTES AND REGULATIONS INVOLVED

The provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, and the regulations of the Federal Communications Commission which are involved are set forth in Appendix B, *infra*.

STATEMENT

The Federal Communications Commission denied the application of Eleven Ten Broadcasting Corporation for renewal of its license to operate radio station KRLA, Pasadena, California. Petitions for rehearing were filed by Eleven Ten and by Immaculate Conception Church of Los Angeles and Lake Congregational Church of Pasadena, who are dependent upon KRLA for broadcasts of their religious services. The several petitions for rehearing were denied, and the Commission's actions were affirmed by the Court of Appeals.

The material facts, for the purpose of this petition, may be summarized as follows:

On December 22, 1958, Eleven Ten applied for the Commission's consent to acquire the license to operate station KRLA. In support of the assignment application, Eleven Ten represented to the Commission that in addition to popular music and news it would also broadcast certain percentages of religious, agricultural and educational programs (R. 510-520). Commission consent was granted and the purchase was consummated on May 1, 1959.[2]

[2] The total investment for the station, including costs involved in increasing the power of the station, as authorized by the Commission, to 50 kw so as to cover most of Southern California, was approximately $1 million. This investment was increased by heavy financial losses which were incurred during the first part of Eleven Ten's operation of the Station (R. 283, 340).

On September 2, 1959, Eleven Ten filed an application to renew the station's license as required by the Commission's regulations.[3] Since the analysis of past programming submitted with this application covered only the period when the station was operated by the former owner, the Commission, by letter dated October 28, 1959, directed Eleven Ten to submit a revised program analysis for the week of October 18-24, 1959, and program logs for each of the seven days (R. 24-25). On November 12, 1959, Eleven Ten filed an amended application which incorporated a program analysis and logs for the week of October 18-24 (R. 27-63).

On December 16, 1959, the Commission wrote Eleven Ten a "Section 309(b) letter"[4] in which it stated that it appeared that KRLA was not being operated in accordance with the programming proposals considered by the Commission in connection with its previous approval of the assignment of license. Because of that and other questionable items, the Commission stated that, in the absence of a satisfactory written explanation of these matters, the renewal application would be

[3] The licenses of all radio stations in a designated geographical area are issued to expire on the same date. In the case of California stations, the expiration date was December 1, 1959, 47 C.F.R. Sec. 3.34. Hence, KRLA had to file a renewal application by early September, 1959, even though it had been under Eleven Ten's ownership for only four months.

[4] This letter was written pursuant to the former Section 309(b) of the Communications Act of 1934, as amended, 47 U.S.C. (1958 ed.) 309(b) to afford Eleven Ten the opportunity to inform the Commission of any reason why its application should not be designated for hearing. The requirement for a "Section 309(b) letter" was omitted from the Communications Act amendments, 1960, 74 Stat. 889.

designated for hearing "on the issues then obtaining." (R. 79-81).

The response to the Section 309(b) letter did not wholly satisfy the Commission on the points which it had raised and, therefore, it designated the renewal application for hearing. The order of designation stated that "no questions exist as the qualifications of the applicant except as to the matters involved in the [four enumerated] issues set forth below," to wit:

> 1. [W]hether, in light of its operations since it acquired Station KRLA, the licensee's program proposals contained in its application for Commission consent to assignment of the license of Station KRLA were made in good faith;
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> 2. [W]hether, in light of the manner in which the "Find Perry Allen" contest was conducted by Station KRLA in and about September, 1959, the licensee operated said station for improper purposes contrary to the public interest;
>
> 3. [W]hether the station's program logs for the week of October 18-24, 1959, were altered with the intent and purpose of deceiving the Commission, and
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> 4. [W]hether, since the date of assignment of license to Station KRLA . . . to the licensee, Jack K. Cooke, a Canadian citizen, has exercised control with respect to the operations of said station contrary to the provisions of Section 310 of the Communications Act of 1934, as amended, and the Commission's rules and policies promulgated thereunder. (R. 125-126).

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[1] A fifth issue merely directed the Hearing Examiner "To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-entitled applications would serve the public interest, convenience or necessity." (R. 126).

The Chief Hearing Examiner and an associate Examiner found on Issue 1 that KRLA had acted in good faith when it made its programming proposals in 1958, even though it later departed to some extent from the proposals in an attempt to recoup heavy financial losses. They also found on issue 4 that Jack Cooke's activities did not amount to control of the station. The Perry Allen contest involved in Issue 2 (and a similar contest conducted during the same week) were found to have contained misleading clues and they were held to constitute an improper use of the station's time. Since, however, the contests had been discontinued, the Examiners stated that the derelictions would be less stringently viewed than would otherwise have been the case. (R. 342).

As to Issue 3, the Examiners found that a former general manager of the station had entered a two-minute daily program in the station's logs for a seven-day period although the program had not actually been broadcast, and that this had been done by him, with intent to deceive the Commission. They concluded, however, that the log alteration could not be imputed to Eleven Ten's sole stockholder and president, Donald Cooke, since he was not aware of the manager's deception until a much later date and notified the Commission as soon as he learned of it. (R. 343).

The Examiners concluded that renewal of KRLA's license would be in the public interest. They held, however, that in view of "censurable managerial immaturity and operational shortcomings" the license should be renewed for a one-year period instead of the customary three years. In their view, the question of whether Eleven-Ten could be relied upon to continue to deliver, on a permanent basis, the meritorious pro-

gram service which it had commenced, as well as the general competence of Donald Cooke as the controlling head and principal policy-maker of the station, could best be answered after an opportunity for Commission surveillance of the station's operations during the forthcoming short-term renewal period. (R. 343, 344).

Upon exceptions to the Initial Decision, the Commission reversed the Examiners and denied the application for renewal. Although the Commission agreed with the Examiners that Donald Cooke had not authorized and was unaware that any misleading clues were contained in the contests broadcast by KRLA, and that he had not authorized and was unaware of any program log alterations, it concluded that the occurrence of these incidents proved that Donald Cooke was liable for neglecting the station. It also concluded that the evidence adduced at the hearing under the specified issues proved that Donald Cooke was guilty of attempting to deceive the Commission as to KRLA's programming. The Commission stated that Donald Cooke's record of neglect and efforts to mislead the Commission disqualified Eleven Ten from being a licensee.

"The opinion of the Court of Appeals erroneously states that the Commission found that KRLA's program proposals had not been made in good faith and that alteration of the station's program logs should be imputed to Donald Cooke (R. 642). The Examiners decided the "good faith" issue in Eleven Ten's favor and the Commission, in its final decision, adopted the Examiners' finding without any contrary indication. In its opinion denying reconsideration, it backtracked only to the extent of stating that the issue "need not be resolved." (R. 506). Moreover, the Commission stated that: "We did not, and do not, say that Donald Cooke knew of or personally countenanced either the log alterations or the manner in which the contests were conducted." (R. 500).

Eleven Ten filed a petition for reconsideration, in which it pointed out that the Commission had decided the case on issues which had not been specified in that there had been no issues as to whether Donald Cooke had neglected or been indifferent to the station's welfare and whether he personally had attempted to deceive the Commission. Eleven Ten claimed surprise by the injection of these new issues and asked for an opportunity to present evidence on these matters.

The two churches which are now seeking certiorari also petitioned for reconsideration of the Commission's decision. They pointed out that for some time they had been using KRLA for broadcasting their Sunday services; that KRLA was the only station in the area which was making its facilities available at a suitable time and without charge for the broadcasting of these special programs which reached shut-ins at hospitals, ships at sea, etc.; and that the listening audience would be deprived of a unique and irreplaceable public service. The Commission was asked to hold a rehearing to take into consideration the effect upon the public of being deprived of this special programming. (R. 489-496).

The Commission's denials of all three petitions for reconsideration (R. 497-508) were affirmed by the Court of Appeals (R. 639).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals, insofar as it allows the termination of a valuable license to turn on issues not specified in a notice of hearing, is of far-reaching importance, not only to proceedings before the Federal Communications Commission, but to adjudicatory hearings before all federal administrative

agencies. We respectfully submit that the Court below was misguided in its assumption that due process and the statutory requirement of specificity of issues are satisfied, merely because, in its view, "The facts marshalled in support of the Commission's ultimate factual conclusion are fairly encompassed within the [specified] issues and constitute substantial evidence of record in support of that conclusion." (R. 642).

If an administrative agency is permitted such extreme flexibility in complying with requirements of specificity of issues, a litigant must be prepared not only to meet charges set forth in the issues on which the hearing is purportedly held but also to contest every other conceivable issue upon which adverse conclusions might be reached from a selective marshalling of the evidence adduced under the specified issues. If allowed to stand, the decision below will have a serious impact on the scope and duration of administrative hearings and upon the burden of litigants before administrative agencies.

The statutory requirement in Section 309(b) of the Communications Act, as amended in 1952, that the Commission "shall notify the applicant . . . of [the grounds and reasons for holding the hearing] specifying with particularity the matters and things in issue but not including the issues or requirements phrased generally . . ." is nullified if the Commission is permitted to bypass specified issues and rest its decision on issues formulated after and as a result of marshalling evidence adduced under the pleadings.[1]

[1] The congressional purpose in inserting the requirement of specificity of issues is clear, not only from the plain language of Section 309(b), but also from the legislative history. A representative of the Federal Communications Bar Association which

We are not contending that the Commission is restricted to matters set forth in the original order of designation. The key to procedural due process is within its grasp. If it should determine to enlarge the scope of the hearing beyond that originally contemplated, it can inform the licensee either before or during the hearing of the new specific issues which are involved, and give the licensee an opportunity to litigate those issues in full. Or, if the existence of additional issues does not become apparent to the Commission until after it reviews the evidence on the specified issues, it can reopen the record to specify the new issues and to give petitioner an opportunity to litigate them. These safeguards for a fair hearing were flouted in the instant case.

The Court below apparently was of the opinion that it does not matter whether or not decisive issues are specified. In its view, it is sufficient that adverse conclusions on unspecified issues have substantial support in the facts of record which are adduced under specified issues. The effect of the instant decision is that a licensee—which under the statute has the burden of proceeding with the introduction of evidence and the

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sponsored the language stated, in hearings on H.R. 5497 before the House Committee on Interstate and Foreign Commerce, 77th Cong., 2d Sess., April 14, 1942, at p. 38: "All too frequently it has been the practice of this Commission and its predecessor to phrase notices of hearing in such manner as to conceal rather than reveal the real points in issue. Such practice is productive of no possible benefit to anyone concerned; it is only conducive to Commission action predicated upon issues which were not dealt with at all or dealt with only incidentally before the hearing officer. Such practice should be made impossible by the terms of the statute itself." Compare Section 5(a) of the Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 5 U.S.C. 1004(a), which also requires the specification of all issues.

burden of proof—now has imposed upon it the additional, overwhelming burden of proceeding at its risk without having the benefit of a delineation of the specific hearing issues. The language of the statute clearly indicates that this heavy burden was not intended. It is important to the fair conduct of administrative hearings for this Court to declare that the statutory provision for specificity of issues as well as the constitutional requirement of due process does not permit a procedure whereby a litigant is required at its peril to guess the real issues.

The Commission's decision to take away Eleven Ten's broadcasting license was bottomed on the conclusion that Donald Cooke, the sole stockholder and president of the licensee, was guilty of efforts to mislead the Commission. This conclusion did not flow from the resolution of any of the four specified issues. The "good faith" and alien control issues were expressly left unresolved by the Commission. And the disposition of the other two issues, the Perry Allen contest and the log alterations, afforded no basis for findings that Donald Cooke attempted to deceive the Commission. For, as the Commission stated: "We did not, and do not, say that Donald Cooke knew of or personally countenanced either the log alterations or the manner in which the contests were conducted." (R. 500).

The facts relied upon by the Commission for finding that Donald Cooke had attempted to deceive it were suggestions for changes in programming which he had discussed with KRLA personnel in October, 1959 and April, 1960, and "misrepresentations" contained in his February 15, 1960 response to the "Section 309(b) letter" and accompanying amendment of the renewal

application. Apart from the lack of substantial evidence for the ultimate finding, the point is that the issue under which evidence of these matters was adduced—namely the issue of his good faith in the 1958 programming representations—apprised him only that he had the burden to establish that he had acted in good faith at that time. In the absence of an issue that he had attempted to deceive the Commission in 1959 and 1960, he should not have been found guilty of that offense.

As soon as the licensee became aware of the Commission's departure from the issues as framed, its counsel, who had participated in preparing the February 1960 response and amendment of the renewal application, requested an opportunity to testify that the programming statements contained therein were based upon information furnished by KRLA's staff, and that any inaccuracies were unintentional. Counsel stated that he had not previously testified, in deference to professional ethics[9] in view of his understanding of the issues. (R. 409). The request to reopen the record was denied even though the Commission did not express any doubt of the adequacy or materiality of the proffered evidence (R. 497, 500).

The Commission's distorted concept of the specificity requirement is also apparent from the manner in which it concluded that Donald Cooke had neglected the sta-

[8] As indicated in n. 1, petitioners request that this question be reserved for argument if certiorari is granted.

[9] Canon 19 of the Canons of Professional Ethics of the American Bar Association provides that "Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

tion.[9] There had not been the slightest suggestion of such an issue. The only issue concerning the extent of Donald Cooke's participation in KRLA's operation was the fourth issue, whether *vel non* he had transferred legal control of the station to his brother, Jack Cooke, a Canadian citizen, in violation of Section 310 of the Communications Act. In view of the overwhelming evidence that Jack's services at the station were merely those which would be performed by any other trusted employee during the short period while Donald was absent, it was concluded that little or no risk was involved in choosing not to reveal on the record the nature of Donald's reasons for leaving the station at that time. If it had been anticipated that the crucial issue would be—not whether Jack's activities amounted to legal control of the station—but rather whether Donald had manifested "indifference" to the day-to-day management by his physical absence from the station, he would have disclosed the reasons for his absence.

Any inference as to the extent of Donald Cook's interest in the station which may logically be drawn from the fact that he was absent during a particular period would depend largely on his reasons for leaving at that time. Obviously, if he left to attend a series of social engagements, a different inference might be drawn than if he left to attend to a family emergency. As soon as the licensee was apprised by the Commis-

[9] Another indication of the Commission's disdain for specificity of issues is its statement that "The specific issue on the Perry Allen contest was designed to adduce evidence to aid in determining whether Eleven Ten operated KRLA for improper purposes. *Evidence concerning any other questionable contest conducted by KRLA* is material for the same reason." (Emphasis added) (R. 398)

sion's final decision) of the importance to the case of a full disclosure of Don's reasons for being absent from the station, it asked for an opportunity to disclose them on the record.

The Commission's attention was called to the fact that counsel for Eleven Ten had revealed, in an off-the-record conference with the Hearing Examiner and counsel for the Commission's Broadcast Bureau, the family reasons which had impelled Donald Cooke to leave the Los Angeles area at that particular time, and offered to adduce testimony on the subject if it were deemed necessary. The Hearing Examiner had advised counsel in substance that so far as he was concerned, such evidence would have no decisional value in the light of the issues as framed. The reasons for Donald Cooke's departure became significant only under the new issue as to whether or not he had neglected the station. The Commission's refusal to afford Eleven Ten the opportunity to meet the issue clearly violates the constitutional and statutory requirements of a fair hearing.

As this Court has stated, "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. . . ."[11] This right to a meaningful hearing is particularly essential when the burden of proof is placed on a licensee to refute charges of misconduct which may result not only in the loss of a million-dollar investment but in the imposition of a taint upon a broadcaster's character and professional status which will remain with him throughout his life.

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[11] *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938). See also *Gonzales* v. *United States*, 348 U.S. 407, 413-414 (1955).

The decision of the Court below conflicts in principle with decisions in other circuits. The Third Circuit, for example, has held that parties are entitled to have issues clearly framed in advance of the final decision and an opportunity to contest them "even though the foundation was the evidence of their own witness which was given in the course of his testimony with reference to the original charge."[12] Obviously the charges upon which a case is tried have much to do with how counsel for litigants examine their own witnesses and cross-examine witnesses for adverse parties. Notice of the specific charges is too important a matter to be withheld from a litigant until all the evidence is adduced. A reaffirmation by this Court of the Commission's statutory obligation to give notice of specific issues as an essential requisite for a fair administrative hearing is urgently needed.

2. The Commission's refusal to consider evidence proffered by petitioners Immaculate Conception Church of Los Angeles and Lake Congregational Church of Pasadena was an abdication of its statutory responsibility to determine the public interest, convenience and necessity. The Court below, in upholding the Commission, relied upon *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223 (1946) for the proposition that the Commission may ignore completely the public service rendered by the station and the impact which the loss of the station's programming may have upon the community

[12] *National Labor Relations Board* v. *Kanmak Mills*, 200 F.2d 542, 545 (3d Cir. 1952); See also, *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F.2d 144, 149 (7th Cir. 1951); *Gallon* v. *Lloyd-Thomas Company*, 264 F.2d 821, 825 (8th Cir. 1959). See also, cases cited in 3 Moore's Federal Practice, pp. 846-847 (2d Ed. 1948).

when it disqualifies the licensee for attempts to deceive the Commission (R. 643). The conflict between this interpretation of *WOKO* and the Commission's duty to consider all public interest factors indicates that *WOKO* is ripe for clarification.

Implicit in *WOKO* is the requirement that there must be at least a threshold consideration by the Commission of public interest factors which favor renewal of the license as against those which favor denial. Thus, the losses in service which would ensue from putting KRLA off the air and the effect upon the public should have been put on the public interest scale, to be weighed with Eleven Ten's qualifications. Otherwise, the Commission cannot be said to have fully discharged its responsibility. *WOKO* held on this point only that the weighing of competing public interest factors is a matter for the Commission, not the courts. Contrary to the interpretation of the Court of Appeals, *WOKO* did not hold that as soon as findings of misrepresentations are made the Commission may wholly ignore the need for the service which the station renders.

We are not contending that the excellence of a station's public program service or the urgent need of the community for programs which only that station carries, as shown in the record of the case at bar, serves to minimize the seriousness of misrepresentations. We do urge, however, that no administrative agency can discharge its statutory responsibility to determine whether renewal of a license is in the public interest, notwithstanding misrepresentations, unless it thoroughly considers the impact upon the public of denying the renewal. In the instant case, this would have included the effect which putting the station off the air would have upon the listening audience which

depends upon it for certain unique and irreplaceable broadcasts, and upon educational institutions, churches, etc., which use the station's facilities to carry their programs. As Mr. Justice Jackson stated in the *WOKO* case: "It may very well be that this Station has established such a standard of public service that the Commission would be justified in considering that its deception was not a matter that affected its qualifications to serve the public." 329 U.S. at 229.

If the Commission had considered countervailing public interest factors, it might well have reached a less drastic result than it did in the case at bar.[13] For example, it might have granted a probationary renewal, as the Examiners did, or it might have concluded that an alternative sanction such as a substantial fine might better serve the public interest than removing the station from the air.[14]

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[13] Curiously enough, in *Spartan Radiocasting Corp.*, 33 FCC 765 (1962), the primary issue before the Commission was whether the licensee's past broadcast record excused its "calculated, deliberate and not insignificant misrepresentations" of material facts." Spartan's broadcast record—which had been compiled during the pendency of litigation—was weighed against its misrepresentations and the Commission concluded that, on the whole, favorable action on Spartan's application was warranted. *Cf. Westinghouse Broadcasting Co.*, 22 RR 1023 (1962). While it is often stated that administrative agencies need not be consistent in their treatment of similar offenses by licensees, the result reached by the Commission in ordering KRLA off the air is so harsh in its impact as compared with its treatment of Spartan, Westinghouse and other licensees as to suggest unwarranted hostility to a licensee who fails to satisfy the Commission's views as to suitable programming. Efforts by the Commission to assert control over programming via the renewal route would, of course, raise a serious question of contravention of the First Amendment rights to freedom of expression and a violation of Section 326 of the Communications Act, 47 U.S.C. 326.

[14] The Commission on many occasions has ordered monetary forfeiture for violations under 47 U.S.C. 503(b)(2).

Finally, the question presented is also important in the application of Section 8(b) of the Administrative Procedure Act. The plain language of Section 8(b) that ". . . (1) findings and conclusions, as well as the reasons or basis therefor [shall be made] upon all material issues of fact, law or discretion presented on the record" precluded the Commission from dispensing with findings on such an important public interest factor as the public's need for KRLA's service. The resolution by this Court of the question whether findings and conclusions must be made even though the balancing of competing factors is a matter of administrative discretion would be of great value to every administrative agency.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August 26, 1963

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17239

IMMACULATE CONCEPTION CHURCH OF LOS ANGELES AND LAKE CONGREGATIONAL CHURCH OF PASADENA, APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

No. 17240

ELEVEN TEN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

On Appeals from Decisions and Orders of
the Federal Communications Commission

Decided July 5, 1963

Mr. Harry P. Warner submitted on the brief for appellants in No. 17239.

Mr. Harold David Cohen, with whom *Messrs. Thomas N. Bowd* and *John R. Schmeltz, Jr.*, were on the brief, for appellant in No. 17240.

Mr. Ernest O. Eisenberg, Counsel, Federal Communications Commission, with whom *Messrs. Max D. Paglin*, General Counsel, *Daniel R. Ohlbaum*, Associate General Counsel, and *Mrs. Ruth V. Reel*, Counsel, Federal Communications Commission, were on the brief for appellee.

Before BAZELON, *Chief Judge*, WASHINGTON and BURGER, *Circuit Judges*.

PER CURIAM: Eleven Ten's application for renewal of Station KRLA's broadcast license was denied by the Federal Communications Commission on March 19, 1962. *In re Eleven Ten Broadcasting Corp.*, 32 F.C.C. 706, 22 R.R. 699. By orders of July 24, 1962, the Commission denied the licensee's petition for reconsideration, as well as petitions for reconsideration and rehearing filed by two Southern California churches pursuant to §405 of the Communications Act of 1934, as amended, 75 Stat. 421 (1961), 47 U.S.C. §405 (Supp. IV, 1963). 33 F.C.C. 92, 22 R.R. 702n. Eleven Ten and the churches appeal under §402(b) of the Act, 66 Stat. 718 (1952), 47 U.S.C. §402(b).

The events leading to denial of KRLA's renewal application may be summarized as follows: On October 22, 1958, Eleven Ten applied for Commission consent to the assignment to it of the broadcast license and construction permit (for increased power) of Station KXLA (later changed to KRLA), Pasadena, California. On the strength of various representations as to programming and other matters, the Commission approved the assignment, and Eleven Ten assumed control. Thereafter, KRLA filed an application for renewal of license, as prescribed by 47 C.F.R. §3.34. On July 5, 1960, the Commission, finding that "no questions exist as to the qualifications of the applicant" except as to four factual issues,[1] designated KRLA's application for hearing.

Pursuant to the designation order, evidence was received on the following issues:

> 1. [W]hether, in light of its operations since it acquired Station KRLA, the licensee's program proposals contained in its application for Commission

[1] A fifth issue merely directed the examiner "to determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-entitled applications would serve the public interest, convenience or necessity."

consent to assignment of the license of Station KRLA were made in good faith;

2. [W]hether, in light of the manner in which the "Find Perry Allen" contest was conducted by Station KRLA in and about September, 1959, the licensee operated said station for improper purposes contrary to the public interest;

3. [W]hether the station's program logs for the week of October 18-24, 1959, were altered with the intent and purpose of deceiving the Commission; and

4. [W]hether, since the date of assignment of license of Station KRLA . . . to the licensee, Jack K. Cooke, a Canadian citizen, has exercised control with respect to the operations of said station contrary to the provisions of Section 310 of the Communications Act of 1934, as amended, and the Commission's rules and policies promulgated thereunder.[2]

The examiners found that KRLA's proposals were made in good faith, that conduct of the "Find Perry Allen" contest (and a similar "Golden Key" contest) resulted in the use of licensed facilities for improper purposes contrary to the public interest, and that the station's program logs were altered by KRLA's general manager in order to deceive the Commission. The examiners recommended a short-term renewal of KRLA's license.

The Commission, reweighing the evidence, found that KRLA's program proposals had not been made in good faith and that alteration of the station's program logs should be imputed to Donald Cooke, the owner of KRLA. The Commission refused to consider alleged "meritorious programming efforts by KRLA *after* the Commission had made it clear to the licensee that renewal of its license was in doubt" as being an unreliable measure of Eleven Ten as a licensee. 33 F.C.C. at ——, 22 R.R. at 702i.

[2] The alien control issue was resolved in favor of KRLA.

KRLA contends that the Commission relied on matters "outside the specific issues under which the hearing was held," thereby depriving it of a fair and full hearing as required by statute and the Fifth Amendment to the Constitution. We read the Commission's decision as founded on the "conclusions that Donald Cooke is guilty of efforts to mislead the Commission" and that his willingness to deceive the Commission warrants denial of KRLA's renewal application. The facts marshalled in support of the Commission's ultimate factual conclusion are fairly encompassed within the first and third issues and constitute substantial evidence of record in support of that conclusion. The Commission's disqualification of Eleven Ten is within the discretion committed by Congress to the Commission. *Federal Communications Comm'n* v. *WOKO, Inc.*, 329 U.S. 223, 227-29 (1946); *Hall* v. *Federal Communications Comm'n*, 99 U.S.App.D.C. 86, 94-96, 237 F.2d 567, 575-77 (1956); *Charles P. B. Pinson, Inc.* v. *Federal Communications Comm'n* —— U.S.App.D.C. ——, —— F.2d —— (decided June 13, 1963).

Appellants contend that the Commission erred in failing to make findings as to KRLA's public service programming and to consider the public service rendered by KRLA in determining whether or not KRLA's license should be renewed. The Commission need not consider the public service rendered by a station where the licensee is disqualified by its attempts to deceive the Commission. *Federal Communications Comm'n* v. *WOKO, Inc.*, *supra*; *Independent Broadcasting Co.* v. *Federal Communications Comm'n*, 89 U.S.App.D.C. 396, 193 F.2d 980 (1951), *cert. denied*, 344 U.S. 837 (1952).

The decision of the Commission will be

Affirmed.

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[1] Since the two appeals have been consolidated and since the churches' appeal present no additional issues for our decision, we do not think it necessary to decide whether or not the churches have standing by reason of KRLA's broadcasting their Sunday services without charge.

These cases came on to be heard on the record from the Federal Communications Commission, and case No. 17,239 was submitted on the brief for appellant; case No. 17,240 was argued by counsel for appellant and both cases were argued by counsel for appellee.

On Consideration Whereof, it is ordered and adjudged by this court that the decision and orders of the Federal Communications Commission on appeal in these cases are affirmed.

Per Curiam.

Dated: July 5, 1963.

APPENDIX B

Statutes and Regulations Involved

Section 309 of the Communications Act of 1934, 48 Stat. 1064, as amended by Communications Act Amendments, 66 Stat. 715 (1952), in effect at all times pertinent to this case, is as follows:

Section 309:

"(a). If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

"(b). If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such

notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. Parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

The pertinent provisions of Sections 5 and 8 of the Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 5 U.S.C. 1004, 1007, are as follows:

Section 5:

"(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleadings . . ."

Section 8:

"(b) . . . All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Rules and Regulations of the Federal Communications Commission, 47 C.F.R.:

Section 1.110. Procedure when an application is designated for hearing.

"(a) When an application has been designated for hearing, the Secretary of the Commission will mail an order to the applicant setting forth the reasons for the Commission's action and the issues upon which the application will be heard. In addition, the notice of hearing will be published in the Federal Register . . .

"(b) Any hearings subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant except as otherwise provided in the order of designation."

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 407

IMMACULATE CONCEPTION CHURCH OF LOS ANGELES, LAKE CONGREGATIONAL CHURCH OF PASADENA, AND ELEVEN TEN BROADCASTING CORPORATION, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–5a) is not yet reported. The decisions and orders of the Federal Communications Commission (J. App.[1] 380–406, 497–508) are reported at 32 F.C.C. 706 and at 33 F.C.C. 92.

[1] "J. App." refers to the printed joint appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on July 5, 1963 (Pet. App. 5a). The petition for a writ of certiorari was filed on August 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 402(j) of the Communications Act of 1934, as amended, 47 U.S.C. 402(j).

QUESTIONS PRESENTED

1. Whether Eleven Ten had reasonable notice of the issues of neglect and deception upon which the Commission based the denial of its application for renewal of a broadcasting license.

2. Whether the Federal Communications Commission may deny the renewal of a license on the ground that the licensee is disqualified by reason of attempts to deceive the Commission, without considering public service programing instituted by the licensee after it is given official notice that the renewal of its license is in doubt.

STATUTES INVOLVED

Pertinent sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*; of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*; and of the Regulations of the Federal Communications Commission, 47 CFR 1.140, are set out in the appendix to the petition. (Pet. App. 5a-7a).

STATEMENT

On December 22, 1958, Eleven Ten Broadcasting Corporation ("Eleven Ten"), wholly owned by Dow

and R. Cooke of New York City, applied for Commission consent to the assignment to it of standard broadcast station KRLA at Pasadena, California (R. 1855-1900).[1] Eleven Ten stated that KRLA would devote certain percentages of its broadcast time to religious, agricultural and educational programs (J. App. 310), that Donald Cooke would spend at least one-fourth of his time at Pasadena in the active operation of KRLA (J. App. 286), and that Donald Cooke's Canadian brother, Jack K. Cooke, would not participate in the ownership or control of KRLA (J. App. 285). The Commission granted its consent and Eleven Ten acquired KRLA on May 1, 1959.

On September 2, 1959, Eleven Ten filed an application for renewal of KRLA's license, which was to expire on December 1, 1959 (J. App. 1-7; R. 1-54). At the Commission's request, Eleven Ten submitted KRLA's program analysis and logs for the week of October 18-24, 1959 (J. App. 33-63). On December 16, 1959, the Commission wrote a so-called "section 309(b) letter" to Eleven Ten, stating that it was unable to find that a grant of the renewal application would serve the public interest, convenience or necessity (J. App. 79-81).[2] The Commission pointed out

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[1] "R. ——" refers to the record of the proceeding before the Commission, filed in the court of appeals. The "Tr." prefix to a record reference is to the original pagination of the hearing transcript in the record before the Commission, which was filed with the court below. These transcript pages were not renumbered in the court record.

[2] This letter was written pursuant to 47 U.S.C. (1958 ed. Supp.) to afford Eleven Ten the opportunity to inform the Commission of any reason why its application should not be designated for hearing.

that questions had arisen as to whether Eleven Ten was meeting its programing proposals, whether it had falsified KRLA's program logs, whether it had conducted a deceptive contest over KRLA, and whether Jack Cooke had improperly assumed control over KRLA.

Eleven Ten asked that it be given until February 15, 1960, to file its reply so that Donald Cooke could personally verify the information to be submitted (J. App. 82–83). On that date it submitted statements signed by Donald Cooke and his employees (J. App. 84–100), including new programming proposals (J. App. 102–124). Eleven Ten listed among its new programs two Sunday morning religious services which had been initiated on January 31, 1960: a Catholic High Mass from the Immaculate Conception Church of Los Angeles, and an hour-long Morning Worship Service from the Lake Congregational Church of Pasadena (J. App. 115).

On July 5, 1960, the Commission issued an order (J. App. 125–126) in which it stated that it was unable to find that a grant of Eleven Ten's application would serve the public interest, and that a hearing was required upon the following issues:

> 1. To determine whether, in light of its operations since it acquired Station KRLA, the licensee's program proposals contained in its application for Commission consent to assignment of the license of Station KRLA (then KXLA) (BAPL-171) were made in good faith;

2. To determine whether, in the light of the manner in which the "Find Perry Allen" contest was conducted by Station KRLA in and about September 1959, the licensee operated said station for improper purposes contrary to the public interest;

3. To determine whether the station's program logs for the week of October 18-24, 1959, were altered with the intent and purpose of deceiving the Commission;

4. To determine whether, since the date of assignment of license of Station KRLA (formerly KXLA) to the licensee, Jack K. Cooke, a Canadian citizen, has exercised control with respect to the operations of said station contrary to the provisions of Section 310 of the Communications Act of 1934, as amended, and the Commission's rules and policies promulgated thereunder;

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-entitled applications would serve the public interest, convenience or necessity.

Hearings were held at Los Angeles, California, from October 31, 1960, through November 9, 1960, and at Washington, D.C., on December 22, 1960.

1. THE EXAMINERS' FINDINGS

On April 21, 1961, the two hearing examiners assigned to the hearing issued their initial decision [1]

[1] Prior to the hearings, the Commission informed counsel for Eleven Ten that it would examine Eleven Ten's "Golden Key" contest as well as the "Perry Allen" contest specifically mentioned in this issue. [J. App. 531-532]

App. 281–345). They found that the Perry Allen and Golden Key contests had been conducted in a deceptive manner (J. App. 342); that KRLA's general manager, without Donald Cooke's knowledge, had altered KRLA's program logs for the purpose of deceiving the Commission (J. App. 343); that Eleven Ten had not adhered to its programing proposals, but that there was no evidence of bad faith at the time of its original submission (J. App. 340–341); and that, although Donald Cooke had asked his brother, Jack, to assume the duties of KRLA's program director in August 1959 (J. App. 295), Donald had not surrendered ultimate control of the station to Jack (J. App. 339). The hearing examiners concluded that the renewal of KRLA's license for a three-year term should be denied, but that it should be given a renewal for a one-year term (J. App. 343–345).

The pertinent factual findings made by the examiners (and sustained by the Commission, J. App. 392–403) were as follows:

(a) *Misrepresentation of programing proposals.*

Eleven Ten had proposed to broadcast farm market prices and other information of interest to farmers on every newscast 24 times a day; a one-hour program each week for a farm audience (J. App. 345); nightly programs on community service and education (J. App. 308–309); and religious programs for three and one-half hours on Sunday mornings between 6:00 a.m. and 12:00 noon (J. App. 308–309).

On October 2, 1959, Donald Cooke wrote to KRLA's program director that he regretted his proposal to include a farm report on each newscast, and that he

would like to remove the necessity of broadcasting religious programs in the 11:00 a.m. to 12:00 noon period on Sundays (J. App. 312–313). Donald Cooke and his staff then developed a plan whereby KRLA would broadcast only two 40-second agricultural newscasts daily rather than 24 (J. App. 314), and would meet the promise for a one-hour weekly agricultural program by broadcasting two 2-minute featurettes each day directed to housewives, listing the best buys in produce (J. App. 314–315). Eleven Ten also planned to claim credit for fifteen minutes of "public service" programing (education or community service) by inserting a single one-minute public service spot announcement in fourteen minutes of popular music (J. App. 313, 315). On October 15, 1959, KRLA's general manager advised the station's advertising sales representative that KRLA's weekday programing would be duplicated on Sundays (J. App. 315–316), thereby eliminating Sunday morning religious programs.

On February 15, 1960, in response to the "Section 309(b) letter," Eleven Ten submitted under oath, in the form of an amendment to its renewal application, program information which it asserted reflected the manner in which KRLA was carrying out its original representations to the Commission. The examiners and the Commission found that this amendment misstated the number, length and frequency of KRLA's agricultural programs during the period between October 1959 and January 1960 (J. App. 322–325).

Eleven Ten also proposed in this amendment extensive religious and educational programing for Sunday

mornings, and submitted letters from religious leaders expressing appreciation for this service (J. App. 115–122). Two months later KRLA's program director urged Donald Cooke to curtail this programing, and by memorandum dated April 12, 1960, Donald Cooke agreed that KRLA would be able to drop some of these programs, but cautioned that "No move should be made until about a month after the FCC has approved KRLA's request for its license renewal" (J. App. 325–327).

(*b*) *The contests*

KRLA broadcast two contests in early September, 1959. In the Perry Allen contest, Eleven Ten offered a prize beginning at $10,000, and decreasing by $1,000 per day, to the first person who would find and identify Perry Allen, a newly hired disc jockey for KRLA (J. App. 299–303, 382). KRLA broadcast clues encouraging its listeners to search for Perry Allen in Los Angeles. However, Perry Allen, as the station knew, was in Buffalo, New York, at the time (J. App. 301–303). Donald Cooke authorized this contest to begin, knowing that Perry Allen could not be in Los Angeles until September 12, 1959 (J. App. 330–331).

In the Golden Key contest, KRLA offered a prize beginning at $50,000 and progressively decreasing to $5,000, to the first person who could find a hidden Golden Key to the station's new 50 kw transmitter (J. App. 297–299). KRLA broadcast clues for finding the Golden Key which were meaningless, having been written by a station employee who did not know where the key was hidden. For publicity purposes, Eleven Ten planned to have the key found on Labor

Day. The key was found on that day after the clues to its location were made obvious, and the prize had been reduced to $5,000 (J. App. 298–299).

(c) Falsification of program logs

In assembling KRLA's program logs for the week of October 18–24, 1959, for submission in response to the Commission's request, the general manager found that the logs listed no religious programs. Without the knowledge of Donald Cooke who was absent, he directed a station employee to insert into the log for each day two minutes of religious programing (J. App. 333–335), although such programing had not been broadcast. The falsified logs were filed with the Commission on November 12, 1959, and, despite the Commission's prompt challenge of their accuracy, the employees of KRLA withheld the facts on the falsification until several weeks before the commencement of the hearings on October 31, 1960 (J. App. 336).

(d) Failure to maintain control

Donald Cooke attempted to manage KRLA from New York City. During the first three months of his ownership, he spent only one week in Los Angeles, and in the total period of seven and one-half months prior to the Commission's Section 309(b) letter he was there only four weeks (J. App. 293). Donald visited KRLA during the second and third weeks of August 1959 but did not remain because of "personal reasons." Before leaving he told his brother, Jack, that KRLA was a "mess" and asked him to take over the duties of KRLA's program director (J. App. 293, 295). The falsification of KRLA's program

logs and the Golden Key and Perry Allen contests took place while Donald Cooke was away from the station (J. App. 296–300). At the hearings, Eleven Ten submitted numerous copies of correspondence between Donald Cooke and his staff to show that he was maintaining responsible control over KRLA despite his long-term absences from the station (J. App. 137–207).

2. THE COMMISSION'S DECISION

The Commission unanimously determined that Eleven Ten's renewal application should be denied (J. App. 380–406). It affirmed the findings of the examiners with respect to the contests and the falsified program logs, stating that the two contests were "fraudulent in the sense that various clues which were broadcast over Station KRLA, were deceptive, and knowingly so"; and that "the only possible purpose of the alteration [of the program logs] was to deceive the Commission" (J. App. 382). In response to the contention that the principal owner of Eleven Ten was unaware of these improprieties, the Commission stressed that this argument reflected an impermissible view of a licensee's responsibilities, which cannot be delegated. The licensee has "a fundamental obligation" to retain "effective control * * * of the station's management and operation" (J. App. 383).

The Commission then reviewed Donald Cooke's activities with respect to Eleven Ten, finding that he failed to exercise proper responsibility (J. App. 383–384), and that, in any event, he countenanced other misrepresentations and evasions about the station's

programing schedule (J. App. 384–388). The Commission concluded (J. App. 389–390):

> The ultimate question posed by the hearing issues is whether a renewal of Eleven Ten's license is in the public interest. In view of the evidence adduced pursuant to the hearing issues, the conclusion is inescapable that responsible management was not characteristic of Eleven Ten's operation of Station KRLA. In its early stages, Donald Cooke failed to maintain effective control of the station's operation and delegated actual control to his brother Jack and to station employees, and during that period the Perry Allen and the Golden Key contests were conducted and the station's logs were altered. * * * After Donald Cooke assumed a greater interest in the details of station operation, he demonstrated a willingness to connive with station employees in various schemes to hoodwink the Commission into believing that KRLA's programing conformed with its program proposals. * * * This record of neglect on the one hand, and of efforts to mislead the Commission, on the other hand, disqualifies Eleven Ten from being a licensee of the Commisssion, and its applications will, therefore, be denied. A willingness to deceive a regulatory body, even as to matters unimportant in themselves, warrants denial of a renewal application. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223.

The Commission also denied Eleven Ten's request that the record be reopened to receive evidence of KRLA's programing subsequent to the hearing (J.

App. 390). Subsequently, the Commission denied a petition for reconsideration and/or reopening of the proceeding (J. App. 406–409), in which Eleven Ten asserted that the Commission had reached its ultimate conclusion upon the basis of issues with respect to which the licensee had not had proper notice (J. App. 497–507).

The Commission also denied petitions for rehearing filed by two churches (joint petitioners herein) to which Eleven Ten had donated free broadcast time following its receipt of the Section 309(b) letter (J. App. 489–496). The Commission stated that it had previously considered the religious programing of KRLA, and that such programing did not outweigh the considerations underlying the conclusions reached by the Commission (J. App. 507–508).

The Commission stayed the effectiveness of its order pending judicial review. Separate appeals were filed by Eleven Ten and by the two churches, and were consolidated by the court of appeals.

3. THE COURT OF APPEALS DECISION

The court of appeals affirmed (Pet. App. 1a–5a). It rejected Eleven Ten's contention that the Commission relied on matters "outside the specific issues under which the hearing was held," stating (Pet. App. 4a):

> * * * We read the Commission's decision as founded on the "conclusions that Donald Cooke is guilty of efforts to mislead the Commission" and that his willingness to deceive the Commission warrants denial of KRLA's renewal

> application. The facts marshalled in support of the Commission's ultimate factual conclusion are fairly encompassed within the first and third issues and constitute substantial evidence of record in support of that conclusion. The Commission's disqualification of Eleven Ten is within the discretion committed by Congress to the Commission. *Federal Communications Comm'n* v. *WOKO, Inc.*, 329 U.S. 223, 227–29 (1946). * * *.

The court also rejected the contention of Eleven Ten and of the churches[*] that the Commission erred in failing to make findings as to KRLA's public service programing. It held (Pet. App. 4a):

> * * * The Commission need not consider the public service rendered by a station where the licensee is disqualified by its attempts to deceive the Commission. *Federal Communications Comm'n* v. *WOKO, Inc.*, *supra*; *Independent Broadcasting Co.* v. *Federal Communications Comm'n*, 89 U.S. App. D.C. 396, 193 F. 2d 900 (1951), cert. denied, 344 U.S. 837 (1952).

ARGUMENT

1. Eleven Ten's main contention is that the Commission's Notice of Hearing failed to specify with particularity the issues (the exercise of responsible control and the practice of deception) on which the

[*] Since the appeals of Eleven Ten and of the churches had been consolidated, and since the churches' appeal presented no additional issues for its decision, the court did not think it necessary to decide whether or not the churches had standing by reason of KRLA's broadcast of their Sunday services without charge (Pet. App. 4a, n. 3). The Commission had challenged the standing of the churches to seek judicial review.

case was decided, and that it was thereby deprived of a fair hearing guaranteed by the Communications Act and the Constitution. The short answer is that Eleven Ten had adequate notice and opportunity to prepare and present its case on these issues and that no more is required. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349–350 (1938); *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 36 (C.A.D.C., 1950); *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839, 841–842 (C.A.D.C.); *Brahy* v. *Federal Radio Commission*, 59 F. 2d 879, 880 (C.A.D.C.); cf. *Northwestern Bell Telephone Co.* v. *Nebraska Railway Commission*, 297 U.S. 471, 475–477; *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572, 578–581.

In fact, a review of the proceedings shows that Eleven Ten defended the case on a ground which necessarily raised the issue (already presented in part in the Notice of Hearing) of Donald Cooke's exercise of responsible control. Now it is complaining because its argument was considered by the Commission but did not result in the grant of its license. A litigant cannot raise issues in the course of proceedings and then complain of lack of notice when they are decided against it. Section 309(b), on which Eleven Ten rests its case, requires only that the licensee be adequately apprised of the issues he must meet. "Designations for hearing, like pleadings under modern procedure, are for the purpose of reasonably apprising the party of the issues involved, and are not to be struck down for non-prejudicial deficiencies"

(*Mansfield Journal Co. v. Federal Communications Commission*, 180 F. 2d 28, 36 (C.A.D.C.)). See *Kuhn v. Civil Aeronautics Board*, 183 F. 2d 839, 841-842 (C.A.D.C.), where the court held that so long as the petitioner there had actual notice of the issue in question as early as the release of the examiner's initial decision, and thereafter litigated that issue, he could not subsequently challenge the propriety of the Board's consideration of the matter.

The question of Donald Cooke's exercise of responsible control over KRLA's operations was squarely tendered by petitioner itself. Thus, Eleven Ten essentially conceded the contest chicanery and programming falsifications charged in issues two and three, but asserted in mitigation that its principal had not been aware of these improprieties. The Commission accepted the fact of Cooke's unawareness, but not in mitigation. Rather, the Commission reasoned that it showed Cooke had failed to exercise responsible control as he was required to do by the statute.

The turn of events was no surprise. It is clear from the hearing proceedings that Eleven Ten appreciated that this defense based upon Donald Cooke's lack of knowledge of serious misconduct in running the station necessarily raised the question whether he had managed the station in a responsible manner. Eleven Ten adduced a large quantity of evidence in an attempt to show that, although he was an absentee owner, Donald Cooke was nevertheless making every effort to maintain responsible control (J. App. 137–207). Numerous proposed findings (R. 799–808) designed to show his effective control were also submitted.

With respect to the Commission's finding that the licensee had engaged in deception, issue one gave notice that the Commission would question whether the licensee's original programming proposals had been made in good faith and in answering this question would consider "its operations since [it] acquired Station KRLA * * *." To review these operations, the Commission necessarily considered the report of programming which Eleven Ten submitted in response to the 309(b) letter as well as its intention to adhere to the program schedule outlined therein. Eleven Ten cannot claim surprise because the Commission's review showed that its report was purposely deceptive and that, as to public service programs shown in its schedule, it had plans to curtail them once its license renewal was granted.

During the hearing, Eleven Ten did not object to the introduction of evidence as to the misconduct of Donald Cooke and others in 1959 or 1960, as being irrelevant, and it indicated that it understood that the basic issue went to the matter of its good faith throughout the period considered by the Commission by proposing the following conclusion to the hearing examiners (J. App. 269):

> * * * The evidence establishes that nothing has been done which impugns the character, intent or motive of the licensee * * *.

Conversely, the Commission's Broadcast Bureau joined issue by proposing the opposite conclusion (J. App. 279):

> * * * the evidence demonstrates that Eleven Ten, as a licensee has been shown to have a proclivity for knowingly furnishing false and misleading information to the Commission. * * *.

The notice requirement does not mean that the Commission must overlook acts of deception which come to light in the course of an inquiry already concerned with that problem, where the issues place the party on notice that the probity of its conduct is in question. Thus, the Commission was not required to issue a new notice of hearing to designate the question whether Eleven Ten had attempted to mislead the Commission by the material submitted in the course of the inquiry into whether the station had submitted false logs and been operating in violation of its commitments. The truthfulness of a licensee quite obviously is a condition to be demanded at all times. In addition, of course, such truthfulness was, under the circumstances here, properly comprised within the fifth issue stated in the notice which was "To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant" of the application would serve the public interest, convenience or necessity.

It is plain that Eleven Ten had ample notice and opportunity, of which it took advantage, to present and litigate the matters on which it now claims surprise. No more was required to satisfy the requirement of a fair hearing.

2. Eleven Ten also contends that the Commission erred in failing to give consideration to the loss of Sunday religious programming which the public would

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The facts stated above (*supra*, pp. 5-10) afford a complete answer to petitioner's suggestion that the record fails to support the Commission's conclusion that Donald Cooke had attempted to deceive the Commission.

sustain upon the denial of its license renewal. The Commission did consider KRLA's public service and religious programming in the period prior to the time the Commission questioned the licensee's qualifications (J. App. 504–506), and was fully justified in refusing to give any consideration to the programming which the licensee instituted a month and a half after its receipt of the 309(b) letter indicating that renewal of its license was in doubt. As the Commission stated in its opinion (J. App. 390–391):

> It [Eleven Ten] was disposed to deceit in advance of any Commission inquiry; it was disposed to deceit at the time of the Commission inquiry; it was disposed to deceit in the programming it would present after renewal of its license. In view of this continued pattern of deception, a meritorious programming farce, which may have been presented while the disposition of its renewal application was still in doubt, does not provide any assurance that such deception would not subsequently be resumed.

Petitioner suggests (Pet. 15–18) that *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, is to the contrary, or that it needs "clarification" to the extent it holds that the Commission need not consider a licensee's past service to the public where the licensee is guilty of misrepresentations. This contention ignores the plain and salutary principle of *WOKO* that where a licensee proves himself unfit, the Commission may insist upon a return of the license so that it may be issued to one who will be trustworthy in addition to providing an adequate

nicature of public service programming. Since the Commission here refused to consider only that part of KRLA's programming instituted by KRLA after its renewal was called into question (J. App. 390-391, 504-505), finding that improvement at that time did not provide assurance of operations in the public interest in the future, the holding of *WOKO* that past programming need not be weighed against misrepresentations is *a fortiori*. As the Court emphasized in that case (329 U.S. at 229):

> It may very well be that this Station has established such a standard of public service that the Commission would be justified in considering that its deception was not a matter that affected its qualifications to serve the public. But it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. * * *

See also *Federal Communications Commission* v. *Broadcasting Service Organization*, 337 U.S. 901, (1949) reversing *Broadcasting Service Organization* v. *Federal Communications Commission*, 171 F. 2d 1007 (C.A.D.C., 1948).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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